85-1225

Supreme Court, U.S.
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No. 85-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

DONALD F. BAKER,

*Petitioner,*

*v.*

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, IN HIS OFFICIAL CAPACITY; AND LEE HOLT, CITY ATTORNEY OF DALLAS, TEXAS, IN HIS OFFICIAL CAPACITY; AND THE CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, IN THEIR OFFICIAL CAPACITIES,

*Respondents.*

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## PETITION FOR CERTIORARI

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## QUESTIONS PRESENTED*

1. May a federal circuit court empower a local prosecutor to represent and bind the interests of an entire state, over the express objection of the state's Attorney General, when the Attorney General has decided that it would disserve the state's interests to appeal a federal district court decision striking down a state law?

2. Even assuming the circuit court's assertion of appellate jurisdiction was defensible, was that court correct in treating the summary affirmance in *Doe* v. *Commonwealth's Attorney* as resolving issues not necessarily reached by this Court in that case?

3. May a federal circuit court treat as judicially non-reviewable a legislative decision to criminalize certain private sexual intimacies on a gender-specific basis, simply because it may be said to reflect the moral preferences of a legislative majority?

*For the purposes of S.Ct. Rule 21.1(b), petitioner notes that, in the court below, Danny Hill, the District Attorney for the 47th Judicial District of Texas, sought to represent the State of Texas.

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DONALD F. BAKER,

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HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS, IN HIS OFFICIAL CAPACITY; AND LEE HOLT, CITY ATTORNEY OF DALLAS, TEXAS, IN HIS OFFICIAL CAPACITY; AND THE CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, IN THEIR OFFICIAL CAPACITIES,

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ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## PETITION FOR CERTIORARI

## OPINIONS BELOW

This petition seeks review of a divided decision of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*.

which is reported at 769 F.2d 289 and reprinted as Appendix A.[1] The memorandum opinion of the United States District Court for the Northern District of Texas, Dallas Division (Buchmeyer, J.), is reported at 553 F.Supp. 1121 and reprinted as App.B. The final judgment of that court is reprinted as App.C. The supplemental opinion of the District Court is reported at 106 F.R.D. 526 and reprinted as App.D. The original decision of the unanimous Fifth Circuit panel is reported at 743 F.2d 236 and reprinted as App.E. The order of the Fifth Circuit denying rehearing *en banc* is reprinted as App.F.

## JURISDICTION

The decision and judgment of the Court of Appeals, sitting *en banc*, were entered on August 26, 1985. A timely petition for rehearing *en banc* was denied, and the mandate was issued, on October 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### A. Constitutional Provisions

The First Amendment:

> "Congress shall make no law . . . abridging freedom of speech, or of the press. . .."

The Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .."

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[1] References to the appendices will be styled, e.g., "App. A"; to particular pages therein, "23a"; to portions of the district court record, "R Vol.I at 23." The appendices are bound in a separate volume.

The Ninth Amendment:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The Fourteenth Amendment:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**B. Statutes**

The text of 28 U.S.C. § 2403(b) is set out in App.G.

Texas Penal Code § 21.06 ("Homosexual Conduct") and the related definitions in §§ 1.05 and 21.01 provide in relevant part:

> A person commits an offense if he [or she] engages in deviate sexual intercourse with another individual of the same sex. "Deviate sexual intercourse" means any contact between any part of the genitals of one person and the mouth or anus of another person.

## STATEMENT OF THE CASE

This case involves a statute that criminalizes specified sexual contacts, even in private between willing adult partners. In *Bowers* v. *Hardwick*, No. 85-140, this Court has already agreed to determine the proper standard of review applicable to a state law that criminalizes similar contacts. Although this case thus presents issues that closely parallel those in *Hardwick*, it also poses an additional procedural question of independent national significance. For the district court judgment invalidating a Texas sodomy statute at petitioner Baker's behest — a judgment awarded against the State of Texas as the true party in interest — would not be here at all had the Fifth Circuit not

asserted jurisdiction over the express objections of the State itself.

Petitioner Donald Baker filed suit under 42 U.S.C. § 1983[2] in the United States District Court for the Northern District of Texas on November 19, 1979, seeking a declaration that the Texas sodomy law, Texas Penal Code § 21.06,[3] is unconstitutional.[4] The complaint named Henry Wade, District Attorney of Dallas County, and Lee Holt, City Attorney of Dallas, as defendants in their official capacities. Defendant Holt promptly moved to have the case certified to the Attorney General of Texas pursuant to 28 U.S.C. § 2403(b), arguing that the state's chief legal officer must be allowed to intervene, because "neither the State of Texas, nor any agent, officer or employee of the State is a party to this suit." (R Vol.I at 58). On June 3, 1980, the district court agreed and granted the motion. (R Vol.I at 60). The Texas Attorney General intervened on July 9, 1980, and proceeded to defend § 21.06 on the merits (R Vol.I at 79), while Wade and Holt represented, pursuant to the district court's order of September 16, 1980, a defendant class consisting of "all district, county and city attorneys" who enforced § 21.06 on behalf of the State of Texas.[5]

The defendants asserted that the Texas statute "furthers the state's interests in protecting 'morality, decency, health, welfare, safety, and procreation.'" (22a). But at trial, the defendants "did not produce a single witness, or any other evidence, to support the[se] alleged state interests." (59a). Defendant

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[2] Jurisdiction was proper under 28 U.S.C. §§ 1331, 1343, 2201, 2202.

[3] The text of the statute is set out at p. 3 *supra*. A violation is punishable by "a fine not to exceed $200." Tex.Penal Code § 12.23. As the district court found, § 21.06 "does not concern rape, sexual abuse by force, offenses involving minors, or sexual conduct in public. Nor does it prohibit sodomy between a husband and wife or between an unmarried male and female. Instead, it condemns only homosexual conduct done in private between consenting adults." (22a).

[4] Petitioner did not seek injunctive relief.

[5] Defendant Holt advised approximately 40 district, county and city attorneys — including Danny Hill's predecessor in office as District Attorney of Potter County — that, if they wished to intervene in the suit, they should do so no later than September 1, 1980. None of them chose to do so. (23a n.1).

Holt "testified . . . that he had no knowledge of any way in which 'private consenting homosexual conduct frustrates procreation,'" or of how prohibiting it "protects the 'morals' of society." (40a). When asked "what kind of societal welfare is furthered by a law that intrudes into the bedroom of consenting sexual adults" (39a), defendant Wade testified, "I don't know of any." *Id.* The district court concluded that "there is no evidence (indeed, even no indication) that any of the interests advanced to support § 21.06 . . . were considered by the legislature when this statute was passed . . .." (41a).[6]

The district court ruled in petitioner Baker's favor on August 17, 1982,[7] holding that the defendants' "assertion of general platitudes (morality, decency, etc.) is totally inadequate to justify § 21.06" (60a) against claims that it violated the right of privacy and the equal protection of the laws when applied to private, noncommercial homosexual conduct between consenting adults (70a-72a). The court entered judgment for plaintiff and enjoined enforcement of § 21.06 on September 30, 1982. Upon judgment in his favor, plaintiff moved for interim costs and attorneys' fees in excess of $80,000 (R Vol.IV at

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[6] The court found "that the *sole* basis for § 21.06 was the fear of a backlash effect against the entire revised Penal Code should private homosexual acts be decriminalized." (103a; *see also* 42a & n.30, 79a).

[7] The court ruled that plaintiff Baker had standing to challenge § 21.06 because "the threat of prosecution [was] 'credible' and 'real,'" (69a). The defendants stipulated that violations of § 21.06 "'have been prosecuted by various assistant city attorneys and assistant district attorneys' in Dallas; and that both defendants 'would prosecute the plaintiff and other homosexuals under § 21.06 if a provable violation of the law came to their attention.'" (25a). A member of the Dallas school board testified that plaintiff Baker would have been fired from his teaching position "if there had even been a suspicion that he had violated § 21.06." (29a n.9, 69a-70a). The court found that even aside from the threat of prosecution, § 21.06 had a detrimental impact on "more than 700,000 individuals in Texas who are homosexuals, although they did not choose to be" (70a), because mere suspicion of the activity proscribed by § 21.06 was a basis for harassment, denial of citizenship and loss or refusal of employment. *Id.* This ruling on standing was affirmed by the Court of Appeals sitting *en banc*. (2a).

808), which were taxed against and paid by the State of Texas.[8]

Although the defendant class representatives decided not to appeal the judgment of the district court, Danny Hill, District Attorney of the 47th Judicial District (Potter County), who had played no part in the trial and who was neither a named defendant nor a class representative, filed a notice of appeal on October 28, 1982. (R Vol.IV at 873). The State of Texas filed a notice of appeal on November 1, 1982 (R Vol.IV at 874), but on March 9, 1983, after reviewing the record and determining that "the interests of the State would be best served by dismissing the appeal,"[9] the Attorney General withdrew the State's appeal. On March 28, 1983, Hill petitioned the Texas Supreme Court to issue a writ of mandamus compelling the Attorney General to pursue the appeal, but the state court refused even to hear Hill's petition.[10]

On April 12, 1983, more than six months after final judgment for petitioner Baker, Hill moved in the district court to intervene and be named class representative pursuant to Fed.R.Civ.P. 23 and 24. While these district court motions were pending, Hill filed identical motions in the Court of Appeals for the Fifth Circuit.[11] After conducting further hearings, the district court denied all of Hill's motions,[12] finding,

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[8] Defendant Wade argued that Dallas County should not be liable for fees because the suit "is, in essence, not only against the State of Texas, but is further particularized as a suit against the Legislature of the State . . .." (R Vol.III at 624). Defendant Muncy, who had succeeded defendant Holt, echoed this position. (R Vol.III at 638).

[9] Brief of the State of Texas on Rehearing *En Banc* at 4.

[10] *Hill et al.* v. *Mattox, Attorney General*, No. C-1973 (Tex.S.Ct. April 6, 1983).

[11] Hill informed the appellate court that identical motions were still pending in the district court. Without considering any evidence, a motions panel judge of the Fifth Circuit allowed Hill to intervene, even though no appeal was pending.

[12] The district court's supplemental opinion was filed on April 3, 1984. A slightly amended version of this opinion was published July 1, 1985, 106 F.R.D. 526, App. D, after Hill's motion for reconsideration was denied by the district court on June 12, 1985.

*inter alia*,[13] that Danny Hill "would not be an adequate representative" of the interests of the state.[14] That finding has never been overturned.[15]

On September 21, 1984, a panel of the Fifth Circuit Court of Appeals dismissed both Hill's petition to intervene directly at the appellate level and his underlying appeal (App.E).[16] The appellate court found that Texas law "plainly designates the Attorney General as the official responsible for protecting the State's interest in litigation" (128a), and concluded that, since the "Texas Attorney General has decided that the sovereign interests of the State are served by foregoing an appeal in this case . . . [i]t should be neither Hill's province nor ours to question that judgment." (132a).

Hill's petition for rehearing *en banc* was granted on January 28, 1985. Although the Attorney General intended to close the case when he withdrew his notice of appeal, he participated in briefing and argument below in order to oppose the court's assertion of jurisdiction.

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[13] The court also found that Hill had failed to show that the interests of the class and of the State of Texas were inadequately represented (110a-111a), and that Hill had failed even to show that he was not simply a front for a private group calling itself "Dallas Doctors Against AIDS" (87a & n.2, 90a & n.8, 111a, 112a).

[14] The district court based this ruling on specific findings relating to the conduct of Danny Hill and his counsel in litigating his post-trial motions: failure to comply with local and federal rules of procedure and evidence (97a-98a, 110a-111a); repeated failure to execute affidavits in support of his motions (90a n.8, 101a, 102a, 110a-111a); making wholly frivolous arguments and accusations (91a & n.9, 99a & n.18, 106a & n.28, 111a); and making misrepresentations to the court. (107a, 111a-112a).

[15] Hill's motion for reconsideration was denied on June 12, 1985. Hill filed a notice of appeal, but action on it was suspended by the Fifth Circuit pending the outcome of the rehearing *en banc*. The appeal has never been taken up by the Fifth Circuit, and has apparently been viewed as moot.

[16] The court unanimously determined: (1) that "the case was vigorously defended . . . both by the class representatives and by the Attorney General" (130a); (2) that Hill had alleged "no collusion, nonfeasance, or interest antagonistic to his own" on the part of the named defendants and the Attorney General, *id.*, nor had he alleged "that the representatives' interests diverged from his" (132a); and (3) that Hill's allegation of inadequate representation was based solely on the fact that the named defendants and the State had chosen not to pursue an appeal in this case. (130a-131a).

In a 9-7 *en banc* decision entered on August 26, 1985, the Fifth Circuit held, over the Attorney General's continuing objection, that Hill, being one of 1,085 county, city and district attorneys in Texas, had standing not only to intervene but also to "*represent the state*" *itself* on appeal (3a) (emphasis added), even though the Attorney General had determined that an appeal was not in the best interests of Texas.[17]

The Fifth Circuit majority proceeded to review the district court judgment on the merits, concluding in one short paragraph that this Court's summary affirmance in *Doe* v. *Commonwealth's Attorney*, 425 U.S. 901 (1976), was dispositive of the due process challenge. As to equal protection, the majority held it sufficient that § 21.06 was not "'totally unrelated to the pursuit of' implementing morality, a permissible state goal." (5a).

In denying plaintiff's petition for rehearing *en banc* on October 23, 1985, the same majority of the Fifth Circuit explained that "it is simply not the business of this court" to require the state to defend its implementation of the moral views of a legislative majority. (135a-136a). The court suggested that plaintiff should be grateful for this judicial deference, for if the court had ruled in his favor, "[t]he feelings of [those who disapprove of homosexuality] . . . could be elevated . . . and their frustrations might be vented upon [homosexuals] . . . ." (137a).

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[17] The majority opinion conceded that "the adequacy of representation [by the Attorney General] of [Hill's] interests, and [of the interests] of the class, is ordinarily an issue that would require hearing and determination by the district court." (4a). But the majority simply ignored the fact that, ten months before the Fifth Circuit decided to rehear the matter *en banc*, such a hearing had in fact been conducted by the district court, which had expressly made the determination — never reviewed by appeal — that "Hill would not be an adequate representative" for the interests of the State. *See* p. 7 & n.14 *supra*. The majority below dispensed with the rule that district court findings on such questions be upheld unless clearly erroneous, Fed.R.Civ.P. 52(a), by declaring itself "entitled to conclude *as a matter of law* that th[e] interests [of Texas law enforcement officials] were inadequately represented" by the Attorney General of Texas, solely on the ground that he had decided that an appeal was not in the best interests of the State. (4a) (emphasis added).

All of these rulings were rendered in order to overturn a district court judgment against a statute that the State of Texas, through its Attorney General, had affirmatively determined *not to appeal*. As the case comes to this Court, therefore, both petitioner Baker and the Attorney General of Texas oppose the assertion of appellate jurisdiction by the court below and urge this Court to vacate the action of the Fifth Circuit in treating the State of Texas as though it had appealed, through Danny Hill, the judgment rendered in favor of petitioner Baker by the district court.[18]

## REASONS FOR GRANTING THE WRIT

The substantive issue decided below is, of course, "an important issue of constitutional law regarding the contours of the right of privacy afforded individuals for sexual matters . . . [an] issue over which courts are divided . . .." *City of North Muskegon* v. *Briggs*, 105 S.Ct. 3535, 3536 (1985) (White, J., joined by Burger, C.J., and Rehnquist, J., dissenting from denial of certiorari). The Fifth Circuit's *en banc* decision in this case resolves that issue in a manner that conflicts squarely with the holding of the Eleventh Circuit in *Hardwick* v. *Bowers*, 760 F.2d 1202 (11th Cir. 1985), *cert. granted sub nom. Bowers* v. *Hardwick*, 106 S.Ct. 342 (1985). Indeed, the Fifth Circuit has ruled, contrary to the Eleventh, not only that no *heightened* scrutiny is appropriate, either in terms of due process or in terms of equal protection, but also that *no* review of the rationality of *any* of the judgments underlying this criminal statute need be undertaken by a federal court in which the statute is properly challenged. Moreover, the Fifth Circuit deemed it irrelevant that the statute in this case,

[18] The state of Texas has accordingly filed a separate petition for certiorari in this Court. If perceived ambiguities as to whether the Attorney General of Texas was a party in the court below cloud the issue of the Attorney General's right to file such a petition for certiorari, petitioner Baker trusts that this Court will treat the Attorney General's petition as an *amicus* brief in support of review and reversal.

unlike that in *Hardwick*, criminalizes acts on a basis expressly dependent upon the *gender* of the actor. Thus, not even a decision by this Court reversing or vacating the Eleventh Circuit's ruling in *Hardwick* on the ground that strict scrutiny is inappropriate would necessarily endorse the extraordinary degree of deference, amounting to virtual abdication of judgment, that the Fifth Circuit accorded the Texas statute in this case. And if the Eleventh Circuit were to be upheld by this Court in *Hardwick*, the Fifth Circuit's ruling would, of course, be incorrect *a fortiori*.

Holding this case on the Court's docket pending final resolution of *Hardwick* is one obvious option. But plenary review, whatever the decision in *Hardwick*, is more appropriate. For, independent of its substantive holding, the Fifth Circuit in this case resolved two further questions in a manner that conflicts with controlling decisions of this Court and threatens to subvert the sound administration of justice by the federal judiciary.

*First*, the Fifth Circuit constituted itself a virtual roving commission to correct what it deemed federal error by permitting a local district attorney to appeal a district court's declaratory judgment — a judgment that the Attorney General of Texas, representing the State as the real party in interest pursuant to 28 U.S.C. § 2403(b), believed it in the best interest of the state, and of the class of nominal defendants, to accept.

*Second*, the Fifth Circuit misconstrued this Court's appellate authority by insisting that this Court's unexplained summary affirmances of district court rulings against plaintiffs must be read as holding more than that this Court simply viewed plaintiffs as entitled to no relief — whether for want of standing or otherwise.

For these reasons, neither denying certiorari, nor granting it solely in order to vacate the decision below and remand for further proceedings consistent with the ultimate decision in *Hardwick*, would suffice to restore sound federal practice in circuit courts. Accordingly, certiorari should be granted and this case set for plenary briefing and argument.

## I. THE FIFTH CIRCUIT'S ATTEMPT TO TRANSFER CONTROL OVER THIS APPEAL FROM THE ATTORNEY GENERAL OF TEXAS TO A LOCAL PROSECUTOR.

### A. Significance Of This Issue.

In an era in which 42 U.S.C. § 1983 has become a common vehicle for challenging the constitutionality of state laws, and in which awards of attorneys' fees to successful plaintiffs under 42 U.S.C. § 1988 have the potential to burden already strained state treasuries,[19] the ability of a state to speak with a single, authoritative voice in responding to such lawsuits is a necessity, not a luxury.

The Court of Appeals for the Fifth Circuit *en banc* turned a deaf ear to that voice in order that it might reverse what it deemed to be an erroneous judgment — about which no party had complained and from which no party had appealed. Thus the Court of Appeals conferred authority to prosecute an appeal on a disgruntled district attorney, who had been denied leave to intervene by the trial court and had been found to be an inadequate representative of the state and of the defendant class.[20]

### B. Texas As The True Defendant.

From the defendants' perspective, the State of Texas is the real party in interest in this case.[21] Despite the fact that Danny Hill is but one of the 1,085 district, county and city attorneys in Texas, and that state law expressly and unambiguously provides that Hill "shall *only* represent the State of Texas in the

[19] Texas has already been taxed by the district court for more than $80,000 in costs and fees in this case (R Vol.IV at 809, 867).

[20] See p. 7 & n.14 *supra*.

[21] Both the majority and the dissent below accepted this premise (3a (majority); 17a (dissent)).

Counties of Potter and Armstrong,"[22] the Fifth Circuit's *en banc* majority effectively elevated Hill above the Attorney General of Texas not only by allowing Hill to countermand the Attorney General's decision not to appeal, but also by empowering the Potter County D.A. "to represent the state" itself. (3a).

But for the Eleventh Amendment, petitioner would have sued the state itself — since his complaint is that an enactment of the Texas legislature is unconstitutional. And under *Ex parte Young*, 209 U.S. 123 (1908), petitioner could have sued the Texas Attorney General for declaratory relief — but for the fact that the Attorney General's role in the enforcement of this law is only a passive one.[23] That fact made it necessary for petitioner to name the local law enforcement officials in whom the State had vested front-line prosecuting authority: the city, county and district attorneys. No member of this defendant class was sued as an individual; they were mere stand-ins for the State of Texas.

In this precise context, "Congress [has] recognized that suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself." *Hutto* v. *Finney*, 437 U.S. 678, 700 (1978).[24] And this Court has likewise observed that official-capacity suits "'represent only another way of pleading an action against an entity of which an officer is an agent.'" *Brandon* v. *Holt*, 105 S.Ct. 873, 878

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[22] Tex.Rev.Civ.Stat. Art. 326k-36, § 8 (emphasis added). *See also id.* at Art. 326k-36a, § 1 (both provisions recodified as Tex.Govt.Code § 43.127(a), (c) (1985)). By the terms of Article V, § 21, of the Texas Constitution, local criminal prosecutors are restricted to representing the State in the State's "District and inferior courts *in their respective counties*." (Emphasis added).

[23] Authority to prosecute criminal cases in the district and inferior courts is reposed in the county and district attorneys in their respective jurisdictions. Tex.Const. Art. V, § 21. That authority may not be given to anyone else, including the Attorney General. *Shepperd* v. *Alaniz*, 303 S.W.2d 846, 850 (Tex.Civ.App. 1957); *State ex rel. Downs* v. *Harney*, 164 S.W.2d 55, 57 (Tex.Civ.App. 1942).

[24] The district court fully understood this reality. In its final judgment, the court ordered that the plaintiff's costs and attorneys' fees were to be "taxed against the *defendant State of Texas*." (86a) (emphasis added).

n.21 (1985) (quoting *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978)).[25] In every relevant sense, therefore, petitioner Baker was litigating against the State of Texas itself. *Hutto* v. *Finney*, 437 U.S. at 699.

### C. Governmental Reasons Not To Appeal An Adverse Decision.

A state may have sound reasons for not appealing an adverse decision. "Unlike a private litigant who generally does not forego an appeal if he believes that he can prevail, the [government] considers a variety of factors, such as [its] limited resources . . . and the crowded dockets of the courts, before authorizing an appeal." *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984). There is also the possibility that various factors may lead "successive Administrations . . . to take differing positions with respect to the resolution of a particular issue." *Id.* In the case at hand, Texas' notice of appeal to the Fifth Circuit was filed by Attorney General Jim Mattox's predecessor in office, just a few days before Mattox was elected in November of 1982. Attorney General Mattox withdrew that appeal several months later.[26]

Even when a change in the government's position is not involved, the decision whether to appeal an adverse judgment is fraught with consequence for the state. An appeal gives an appellate court an opportunity to affirm the judgment below

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[25] Hill has never alleged, nor could he allege, any interest in this case distinct from that of the State of Texas in seeing its criminal laws enforced. In his individual capacity, Hill has no "judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Thus Hill, like the named defendants who requested that the case be certified to the Attorney General of Texas pursuant to 28 U.S.C. § 2403(b), "ha[s] no personal interest in the conduct of the State's litigation." *Hutto* v. *Finney*, 437 U.S. at 699 n.32.

[26] Those in the executive branch responsible for enforcing a given statute may also wish to use an adverse decision as an opportunity to engage the state legislature or the state's courts in a dialogue leading to a state, rather than a federal, resolution of the dispute — by proposing, for example, narrower statutory language or a suitable narrowing interpretation.

in more sweeping terms, or on grounds that the state may find even more objectionable. In such a situation, prosecution of the appeal may well be deemed more than a waste of time and effort. And the record of a particular case may seem so unfavorable to the state's highest law enforcement officials as to make discretion the better part of valor.[27]

Appeals of adverse judgments also entail financial risks to the state. The delay involved in pursuing an unsuccessful appeal allows time for the interest on a monetary judgment to compound, and interim inflation almost inevitably increases the cost of compliance with remedial court orders.[28] Appeals of constitutional challenges such as the case at hand also threaten the state treasury with the possibility of additional awards of attorneys fees under 42 U.S.C. § 1988. *Hutto* v. *Finney*, 437 U.S. at 693, 699. Texas has already been taxed by the district court for more than $80,000 in costs and fees (R Vol.IV at 809, 867), and it will obviously be liable for any future awards under § 1988. *See Brandon* v. *Holt*, 105 S.Ct. at 878; *Hutto* v. *Finney*, 437 U.S. at 699; *Crane* v. *Texas*, 759 F.2d 412, 429, 430, 432 (5th Cir. 1985), *reh'g denied*, 766 F.2d 193, 194 (5th Cir. 1985).

Moreover, allowing the state to be represented by anything less than its chief legal officer would fail to ensure the adequate adversarial confrontation "upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The plain fact is that city or county attorneys typically lack both the ability, in terms of staff and other resources, and the power, it terms of

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[27] In the case at hand, the record reveals the defendants' inability even to explain, let alone to prove, how the challenged statute served *any* state purpose. (*See, e.g.* 38a-40a).

[28] By the time Attorney General Mattox was elected and managed to conclude 13 years of prison conditions litigation in *Ruiz* v. *Estelle*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983), the delays in resolving the case had increased the cost of implementing remedial measures — and therefore the cost of settling the case on behalf of the Texas Department of Corrections — by as much as $146 million. The *Ruiz* lawsuit also cost the state nearly $7 million in attorneys' fees. *Dallas Times Herald* at A-21 (May 17, 1985).

statutory authorization, to represent the state adequately in constitutional litigation.[29]

In particular, Danny Hill cannot internalize, in his official capacity as District Attorney for Potter County, the costs and benefits to the entire State of Texas that are necessarily at stake in this constitutional challenge to a state criminal statute. Hill may safely be accorded prosecutorial discretion within his bailiwick in the northern Texas panhandle; but, as the scale of the legal controversy increases, both geographically and otherwise, so must the resources and the legal and political authority of the officer in charge.[30]

The court below is thus manifestly mistaken in its conclusion that "allowing the appeal to proceed" over the objections of the Attorney General "prejudiced no one." (3a). The treasury and sovereign prerogatives of Texas have obviously been put at risk and have, in that sense, been prejudiced — even though the Fifth Circuit reversed the district court judgment.[31] And petitioner Baker's own interests have been profoundly prejudiced: had the Attorney General's decision on behalf of the

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[29] For example, only the Attorney General of Texas may "compromise or settle" suits brought against officers or employees of most state agencies "for deprivation of a right . . . secured by the Constitution or laws of . . . the United States." Tex.Rev.Civ.Stats. Art. 6252-26, §§ 1.(a) (2), 2 (recodified as Tex.Civ.Prac. & Rem.Code §§ 104.001-104.005 (1985)). And "[a]n admission made by a district or county attorney in a suit or action to which the state is a party does not prejudice the rights of the state." Tex.Govt.Code § 41.003 (1985). See also pp. 11-12 & n.22 *supra*.

[30] As long ago as *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court recognized that only a level of government high enough to represent all who are directly affected by a decision may be entrusted with the power to decide. *Id.* at 431. In Chief Justice Marshall's words, a "difference . . . always exists . . . between the action of the whole on a part, and the action of a part on the whole . . .." *Id.* at 435-36.

[31] The legitimacy of a circuit court's seizure of jurisdiction and its usurpation of a state's sovereign prerogatives cannot be judged by the fortuity of the outcome in this or any other particular instance. This case is not over yet, and the Fifth Circuit's actions may ultimately do little more than subject Texas to liability for another award under § 1988. In any event, Texas and the other states in the Fifth Circuit can hardly rest assured that the Court of Appeals — and, ultimately, this Court — will always rule in their favor whenever the Fifth Circuit compels them to pursue appeals from adverse judgments.

State of Texas been respected by the Fifth Circuit, the district court's judgment in Baker's favor would have been undisturbed.

In the federal Department of Justice, the authority to appeal adverse judgments is reposed not in the hundred-odd United States Attorneys, but in the office of the Solicitor General.[32] That office has long pursued a policy of accepting defeats in lower courts when an appeal would not, in its judgment, serve the interests of the government as a whole. *See United States* v. *Mendoza*, 464 U.S. at 160-61. Surely the sovereign State of Texas enjoys an equal right to focus discretionary power over appeals in its chief legal officer. *Compare Hercules Carrier, Inc.* v. *Florida*, 768 F.2d 1558, 1578-80 (11th Cir. 1985) (applying rationale of *Mendoza* to hold that state governments are equally entitled to flexibility in deciding when to press a case).

## D. Congressional Recognition Of The Role Of State Attorneys General.

Although Texas law leaves it to the discretion of the Attorney General, and not to any one of the thousand-odd local prosecutors, to forego an appeal in a case such as this,[33] it is conceivable that Congress could override that allocation of authority. But the Fifth Circuit cannot.[34] For it is to the Congress, and not the Article III courts, that the protection of those sovereign interests is primarily entrusted — both under the Tenth Amendment, *see Garcia* v. *San Antonio Metropolitan Transit Author-*

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[32] 28 C.F.R. § 0.20(b) (1984); *see United States* v. *Mendoza*, 464 U.S. 154, 160 n.6 (1984).

[33] *See* pp. 18-20 *infra*.

[34] There is no doubt, of course, "that the Courts of Appeals have supervisory powers that permit . . . the promulgation of procedural rules governing the management of litigation." *Thomas* v. *Arn*, 54 U.S.L.W. 4032, 4034 (U.S. December 4, 1985). But such supervisory powers may not be exercised in ways that conflict with congressional enactments, *id*. Nor is there any statute or precedent that authorizes the Fifth Circuit to supplant a state's sovereign judgment as to whether an appeal is wise with the Circuit's own roving assessment of which unappealed decisions merit reversal.

*ity*, 105 S.Ct. 1005, 1020 (1985), and under the Eleventh Amendment, *see Atascadero State Hospital* v. *Scanlon*, 105 S.Ct. 3142, 3147-49 (1985). Absent a clear statement by Congress of its intent to displace a state's legal hierarchy on a matter demonstrably affecting the state's law enforcement strategy and potentially burdening the state's treasury, the federal judiciary should be deemed to lack any authority to take such a step on its own.

Far from having made any such statement, Congress has long recognized the primacy of state attorneys general in directing litigation challenging the constitutionality of state law. Section 2403(b) of Title 28 of the United States Code grants a state's attorney general an automatic right of intervention and full party status in any federal judicial proceeding in which the constitutionality of a law of that state is drawn into question. See App. G. This provision is no mere formalistic notice requirement. In drafting § 2403(b), Congress expressly noted its solicitude for the prerogatives of "the chief legal officers of the States." S.Rep. No. 204, 94th Cong., 2d Sess. 9, *reprinted in* 1976 U.S. Code Cong. & Ad. News 1988, 1997 (hereafter "S.Rep. No. 94-204").

This congressional policy is animated not by the niceties of federal-state protocol, but by a profoundly practical recognition of the realities of government hierarchies and the demands of litigation. In enacting the mandatory mechanism in § 2403(b), Congress sought to assure an adequate opportunity for state attorneys general to appear in, and to control appeals from, cases challenging the constitutionality of their states' laws. S.Rep. No. 94-204 at 10. In the instant case, intervention by the Texas Attorney General pursuant to § 2403(b) to protect the interest of the state as the real party in interest plainly entails a presumption that, if "the State's Attorney General . . . ha[s] decided that it is not in the state's interests to appeal, it is not the province of any of the 1,085 district, county, and city attorneys of the State to do so on the *a priori* basis that all others are out of step and that he alone knows the state's true interest." (18a) (dissenting opinion).

It is no surprise that § 2403(b) is designed to involve the states' attorneys general, and not merely their inferior agents and local legal representatives. For the provision was enacted in 1976 as a successor to the largely repealed three-judge court requirement. *See* P.L. 94-381, 90 Stat. 1119; S.Rep. No. 94-204. The purpose of that unwieldy jurisdictional device was, in Justice Frankfurter's words, the provision of "procedural protection against an improvident *state-wide* doom by a federal court of a *state's* legislative policy." *Phillips* v. *United States*, 312 U.S. 246, 251 (1941) (emphasis added). Under the Three-Judge Court Act, as under § 2403(b), the federal judiciary had been directed by Congress to deal with the states through their attorneys general. *See, e.g.*, 28 U.S.C. § 2284 (2), (5). The Act did not apply if the law challenged were a purely local ordinance or a state enactment having only local application, *Moody* v. *Flowers*, 387 U.S. 97, 101 (1967); *Ex parte Collins*, 277 U.S. 565, 568 (1928), nor did it extend to suits against local officers or even against "state officers performing matters of purely local concern," *Moody* v. *Flowers*, 387 U.S. at 102. But the Act did apply to — and the state's attorney general was to be involved in — suits brought against a local officer performing a state function that embodies a policy of statewide concern, such as a local district attorney enforcing a criminal statute of statewide application. *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 94 (1935).[35] The legislative genealogy of § 2403(b) makes plain its purpose of ensuring that the federal courts solicit and respect the views of a state's designated legal spokesman whenever *state*, rather than merely local, concerns are threatened by federal litigation.

## E. Texas' Designated Legal Spokesman.

Presumably, a state remains free, despite these considerations, to fragment its law enforcement structure by deciding

[35] Indeed, the *Spielman* Court held that it is this "function [of] . . . enforcing a statute of general application [that] is of controlling importance in giving effect to the intent of the Congress." *Id.* at 94-95.

that any of its hundreds of local prosecutors may represent and bind the entire state in certain procedural settings.[36] But there is no reason to attribute to the State of Texas so aberrant a scheme.[37]

On the contrary, the Constitution and laws of Texas designate the Attorney General as "chief law officer of the state," and charge him with "representing the state in civil litigation."[38] This power to represent the state is "exclusive," and "if the services of other lawyers are to be had it must be with [the Attorney General's] permission and 'in subordination' to his authority." *United States* v. *Texas*, 680 F.2d 356, 368 n.16 (5th Cir. 1982); *see also Hill* v. *Texas Water Quality Bd.*, 568 S.W.2d 738, 741 (Tex.Civ.App. 1978). The Texas Supreme Court has long held that, with respect to litigation, "the Attorney General must exercise judgment and discretion, which will not be controlled by other authorities." *Charles Scribner's*

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[36] *See New York* v. *Uplinger*, 104 S.Ct. 2332, 2333 n.1 (1984) ("The allocation of authority among State officers to represent the State before this Court is . . . wholly a matter of State concern"); *Personnel Administrator* v. *Feeney*, 429 U.S. 66 (1976) (certifying to state's highest court the question of who could represent various state agencies and officers in this Court).

[37] Were there any reason to suppose that Texas had taken such a step, the proper course would be for this Court to certify an appropriate question to the Texas Supreme Court. The following question might, in that event, be a suitable one:

> Does Texas law provide that a local prosecutor may pursue an appeal and bind the State and its treasury over the objection of the Attorney General, in a civil case in which the Attorney General has appeared on behalf of the State, and in which the State is the only true party in interest?

On November 5, 1985, the Texas electorate approved an amendment to Article V of the State Constitution, granting the Texas Supreme Court "jurisdiction to answer questions of state law certified from a federal appellate court." Tex.Const.Art. V § 3-c(a). The amendment took effect January 1, 1986, and thus was not available to the court below.

[38] Tex.Const. Art.IV, § 22 (Interpretive Commentary). *See also* Tex.Rev.Civ.Stat. Art. 4395 ("The Attorney General shall prosecute and defend all actions in the Supreme Court or the Courts of Civil Appeals in which the State may be interested").

*Sons* v. *Marrs*, 114 Tex. 11, 27, 262 S.W. 722, 727 (1924).[39] This discretion necessarily includes the power "to decide whether to appeal a case in which the State ha[s] experienced an adverse judgment in the trial court." *Bullock* v. *Texas Skating Ass'n*, 583 S.W.2d 888, 894 (Tex.Civ.App. 1979).

## F. Conclusion.

In sum, both Congress and the State of Texas have designated the Texas Attorney General as the authoritative legal voice for the state when it is the real party in interest — as in cases that challenge the constitutionality of state laws.[40] Neither sovereign authority — and there are but two in our federal system, *see Community Communications Co.* v. *Boulder*, 455 U.S. 40, 53-54 (1982) — has authorized any of the 1,085 local law enforcement officials in Texas to expose the Texas treasury to liability for attorneys' fees on appeal over the objections of the state's Attorney General, or to determine what litigation strategy is in the best interests of the entire State of Texas. It is a principle of long standing that a state's sovereign

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[39] Danny Hill has himself previously conceded this issue. After the state withdrew its appeal, Hill and State Representative Bill Ceverha unsuccessfully petitioned the Supreme Court of Texas for a writ of mandamus compelling the Attorney General to prosecute the appeal. See n. 10 *supra*. In their sworn, verified petition, they contended that the issuance of such a writ to the Attorney General was their only adequate remedy, because "*no other state official or agency has the authority to represent the State of Texas*." Relators' Answer to Respondent's Reply to Motion for Leave to File Petition for Writ of Mandamus at 2 (emphasis added). Indeed, after the Texas Supreme Court refused even to *hear* Hill and Ceverha's petition, Rep. Ceverha introduced legislation to deprive the Attorney General of his discretion to abandon the defense of a challenged state law. The official Bill Analysis issued by the Texas legislature's Committee on State Affairs declared that "[u]nder current Texas law the Attorney General may enter into an out-of-court settlement of a suit pending before a federal court that would have the effect of . . . declaring a state statute to be unconstitutional under federal law." Bill Analysis of H.B. 867. The bill was defeated.

[40] This Court has itself stated that, "in addressing the constitutionality of a statute with state-wide application [, it] consider[s] highly relevant the views of the State's chief law enforcement official." *New York* v. *Uplinger*, 104 S.Ct. 2332, 2333 n.1 (1984); *see also* Sup.Ct.Rule 36.4.

immunity may not be breached in a federal court without permission, in "unequivocal terms," from Congress or from the state itself. *Green* v. *Mansour*, 54 U.S.L.W. 4011, 4012 (U.S. Dec. 3, 1985).

Unless the Fifth Circuit's contrary ruling in this respect is reversed, the circuit courts, and this Court, could confront a wave of appeals brought by district or city attorneys in any of the 50,000 "different units of local government in this country," *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 407 (1978) (footnote omitted). Those law enforcement officials are often the nominal defendants in § 1983 actions. Petitioner Baker thus stands injured by an assertion of appellate jurisdiction that is inconsistent with state sovereignty, with federal law, and with this Court's need to maintain the orderly administration of the federal courts.

## II. THE FIFTH CIRCUIT'S ATTRIBUTION OF CONJECTURAL MEANINGS TO THIS COURT'S SUMMARY DISPOSITIONS.

Rivaling the Fifth Circuit's unjustifiably *broad* view of its own appellate jurisdiction is that court's unwarrantedly *narrow* view of the appellate jurisdiction of this Court — a view that led the Fifth Circuit to conclude that this Court *had* to have endorsed the due process/privacy views of the district court whose judgment it summarily affirmed in *Doe* v. *Commonwealth's Attorney*, 425 U.S. 901 (1976), rather than affirming that judgment on any other basis. The Fifth Circuit expressly adopted (see 4a-5a) the analysis of Judge Kravitch's dissenting opinion in *Hardwick*, 760 F.2d at 1213-16, to the effect that, if the plaintiff in that case had lacked standing to challenge the Virginia sodomy law, this Court would automatically have been deprived of jurisdiction even to hear the plaintiff's appeal, and would have had no choice but to "*dismiss the appeal.*" 760 F.2d at 1214 (emphasis in original). That is flatly wrong. As long ago as *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936), Justice Brandeis reasoned that, because the

plaintiffs in that case lacked standing, the Court should *affirm* the lower court's decision against plaintiffs "without passing upon it." *Id.* at 341 (concurring opinion). Clearly, the *ground* on which a lower court purports to act in ruling against a plaintiff is immaterial: an unexplained affirmance of such a ruling by this Court should be deemed to stand for no more than the proposition that the *result* below — a judgment against plaintiff — was correct on the record made in the lower court.[41]

Indeed, Justice Rehnquist's concurring opinion in *Pressler* v. *Blumenthal*, 434 U.S. 1028 (1978), demonstrates the plain error both of Judge Kravitch and of the Fifth Circuit's reliance upon her analysis. Justice Rehnquist joined this Court's summary affirmance of *Pressler* v. *Simon*, 428 F.Supp. 302 (D.D.C. 1976), on the express ground that "such affirmance does not necessarily reflect this Court's agreement with the conclusion reached by the District Court on the merits . . .. Our 'unexplicated affirmance' without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits . . .." *Pressler* v. *Blumenthal*, 434 U.S. at 1028-29 (Rehnquist, J., concurring).[42]

*Doe* v. *Commonwealth's Attorney* is procedurally indistinguishable from *Pressler*. That the issue of standing was not raised by the parties in *Doe* is, of course, immaterial. For the authority of this Court to raise the issue of justiciability *sua sponte* is beyond question. Entirely apart from opinions of this Court subsequent to *Doe* expressly raising the question of just what that case should be taken to have decided, *see, e.g., Carey*

[41] As the Chief Justice explained in his concurring opinion in *Fusari* v. *Steinberg*, 419 U.S. 379, 391-92 (1975), a summary affirmance of a three-judge district court "affirms the judgment but not necessarily the reasoning by which it was reached." Thus, the precedential effect of a summary disposition must "be assessed in the light of all of the facts in that case . . .." *Mandel* v. *Bradley*, 432 U.S. 173, 177 (1977) (*per curiam*) (reversing a trial court that had relied on a previous summary affirmance). Surely the fact that the plaintiff in *Doe* alleged nothing approaching a concrete harm sheds some "light" on the significance of that summary disposition. See n. 44 *infra*.

[42] The District Court for the District of Columbia had held that Representative Pressler had standing to challenge the constitutional validity of two statutes controlling congressional salaries, but found the statutes to be constitutional. 428 F.Supp. at 306.

v. *Population Services International*, 431 U.S. 678, 688 n.5, 694 n.17 (1977), it therefore seems clear that the Fifth Circuit treated this Court's summary affirmance improperly and thereby exacerbated the extant confusion as to the value of summary dispositions in the lower federal courts.[43] Unless this Court wishes to assume the burden of explaining, in every case like *Doe*, whether it is affirming on the ground that it deems the challenged statute to be valid or on the ground that it deems the plaintiffs — who, in *Doe*, had alleged no concrete injury whatever[44] — to lack standing, the reasoning of the court below must be repudiated in no uncertain terms.[45]

## III. THE FIFTH CIRCUIT'S ABDICATION OF ANY MEANINGFUL REVIEW.

Reaching the merits, the Fifth Circuit, having treated *Doe* v. *Commonwealth's Attorney* as decisive on the due process/privacy issue, disposed of the equal protection claim against § 21.06 in a single, short paragraph, declaring that "the standard of review is whether [the statute] is rationally related to a legitimate state end." (5a). For the reasons that follow, this

[43] In particular, there is a clear conflict among the circuits on the meaning of this Court's summary disposition of *Doe* v. *Commonwealth's Attorney*. The Eleventh Circuit (*Hardwick* v. *Bowers*) has ruled that that decision does not foreclose meaningful scrutiny of sodomy laws, while the Fifth (*Baker* v. *Wade*) and District of Columbia Circuits (*Dronenburg* v. *Zech*, 741 F.2d 1388 (1984)) have held that *Doe* conclusively defines the limits of the Constitution's protection of intimate personal behavior.

[44] The plaintiff alleged only that his awareness of the Virginia sodomy law had a "chilling effect" on his social life. See Jurisdictional Statement in *Doe* v. *Commonwealth's Attorney* No. 75-896 at 4. Contrast n. 7 *supra*.

[45] Having granted certiorari in *Hardwick*, wherein the Eleventh Circuit *reversed* a district court judgment against the plaintiff and remanded for a trial on the merits — this Court will presumably decide, on the merits, whether or not the heightened scrutiny for which the Eleventh Circuit called is proper, *regardless* of how lower courts should treat summary affirmances such as that in *Doe* v. *Commonwealth's Attorney*. Since *Hardwick* cannot be resolved in an opinion that merely unscrambles the state of the law on summary dispositions, *Baker* presents a far more suitable vehicle for clarifying this much mooted area of federal practice.

standard is wholly inadequate to test a law that would ban consenting, adult sexual intimacy in the confines of the home — whether challenged as an invasion of fundamental privacy or as a violation of equal protection. Moreover, even if mere rationality *were* the appropriate test of such a law, the Fifth Circuit proceeded in a manner that emptied that requirement of all content.

## A. Inadequate Scrutiny In Light Of The Special Context Of Intimacies In The Home.

No decision of this Court reviewing a statute criminalizing an intimate aspect of personal liberty has ever endorsed such deference to the legislature as that required by the mere rationality standard to which the court below paid lip service.[46] However acceptable such a lax standard may be in reviewing laws regulating commerce and conduct in the public realm, it is fundamentally incompatible with limited government for the same standard to be applied to laws reaching into intimate relationships in the privacy of the home. For whatever the threshold of harm or offensiveness the state must establish to justify intruding upon conduct in *public*, it is settled that the required threshold is significantly higher when the same conduct occurs in a place, or under circumstances, that the individuals involved justifiably regard as private. *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Absent fears about sexual acts involving children, coercion, or commerce — none of which § 21.06 remotely addresses — intimate behavior in the solitude of a private home is subject to criminal prohibition only within judicially reviewable bounds of public justification. That is the irreducible minimum

[46] The Eleventh Circuit accordingly mandated stricter scrutiny of the State of Georgia's statute criminalizing all private oral or anal sexual contact — heterosexual *or* homosexual — in its decision in *Hardwick* v. *Bowers*, now awaiting argument in this Court. If the Court should postpone consideration of this petition pending a decision in *Hardwick*, and were then to affirm the judgment of the Eleventh Circuit, this petition should be granted at that time and the judgment of the Fifth Circuit vacated as based on an insufficiently rigorous standard of review.

for which *Stanley* v. *Georgia* surely stands. *See Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438, 447-50 (1972). The deference that this Court has shown to regulation of *public* dissemination of obscene material — for example, in *Paris Adult Theatre I* v. *Slayton*, 413 U.S. 49 (1973) — has been replaced by more searching scrutiny when a state has sought to criminalize the *private* possession and viewing of the very same obscene material at home. *Stanley* v. *Georgia*, 394 U.S. at 564-65. As this Court recognized in the Chief Justice's opinion in *United States* v. *Orito*, 413 U.S. 139, 142 (1973), "[t]he Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing and education. . . . It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public."[47]

This recognition that the state's power to ban an act in private does not automatically follow from its power to condemn the same act as morally offensive in public is fundamentally at odds with the ruling of the court below. For that court held that, to defend a criminal prohibition such as the one challenged here, the State of Texas need do nothing more than report to the federal judiciary a popular aversion to the conduct proscribed. That is plainly not enough.

Even where the state invokes so powerful an interest as that of protecting potential human life, this Court has made clear "that, by adopting one theory of life, Texas may [not] override the rights [of individuals] that are at stake." *Roe* v. *Wade*, 410 U.S. 113, 162 (1973). Surely Texas, simply by adopting one theory of morality, may not override, at a single stroke, the rights of physical and associational privacy that are at stake in this case. No tenable view of the appropriate level of judicial scrutiny could support so utterly deferential a posture as that endorsed by the Fifth Circuit.

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[47] Texas itself recognized as much when it decriminalized private acts of fornication and adultery at the same time that it enacted § 21.06. (24a).

## B. Inadequate Scrutiny Of The Gender Classifications In § 21.06.

Independent of the special privacy features of the conduct Texas would criminalize, the discrimination the law works on the basis of gender requires closer scrutiny than the minimal review the court below endorsed. Section 21.06 criminalizes certain physical contacts *only* if performed by members of the same gender. Should petitioner Baker, or any other man, be charged with oral or anal sexual contact with another man, in violation of the statute, an *element* of the offense would be the fact that the accused is male.[48] But if a woman were to commit those *identical acts* with the very same partner and be indicted under § 21.06, she would be entitled to acquittal on the ground that she is female. Similarly, for a person accused of violating § 21.06 with a woman, the law makes the fact that the accused is female decisive of criminality.[49]

That the statute is of "equal application" to men and women alike is no defense to the contention that it makes the criminality of particular conduct turn on the gender of the accused, any more than it was a defense of the miscegenation law struck down in *Loving* v. *Virginia*, 388 U.S. 1, 8-9 (1967), that that statute had "equal application" to blacks and whites. The miscegenation laws were unanimously held unconstitutional because they proscribed marriage *only* when "engaged in by

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[48] Before the latest revision in 1974, the Texas sodomy statute outlawed *all* oral and anal sex, regardless of the gender of those involved. (24a, 77a). Only four other states (Arkansas, Kansas, Montana and Nevada) make the gender of those accused of sodomy an element of the crime. Ark.Stat. § 41-1813 (1977); Kan.Stat. § 21-3505 (1974); Mont.Rev.Code § 94-5-505 (1975); Nev.Rev.Stat. § 201.190 (1977).

[49] It cannot be said that § 21.06 involves no gender classification of individuals but merely classifies on the basis of whether the *two people* involved are of the same or of different sexes. Although it does so classify, the Fourteenth Amendment addresses the rights of *individuals*, *Eisentadt* v. *Baird*, 405 U.S. 438, 453 (1972), not of pairs. From the point of view of any given individual, it is decisive that what the statute permits the individual to do and what it forbids are functions of the gender of that person.

members of different races." 388 U.S. at 11.[50] Likewise, § 21.06 must at least be subjected to meaningful scrutiny because it proscribes conduct otherwise legal in Texas (sodomy) *only* when engaged in by members of the same gender. To paraphrase *Loving*, it is difficult to conceive of a valid legislative purpose which makes a person's gender the test of whether conduct is a criminal offense. 388 U.S. at 11; *id.* at 13 (Stewart, J., concurring).

The fact that this statute, unlike the Georgia law at issue in *Hardwick*, proscribes conduct on the explicit basis of the accused's gender and, in that sense, resembles other gender-based classifications, is thus an independent basis for review of the decision below. For "the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged." *Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464, 468 (1981); *see Craig* v. *Boren*, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring).[51]

## C. Abdication Of Even The Requirement Of Rationality.

Even if the court below were correct in holding a minimal relationship to a legitimate state purpose enough to defend the law, the judgment below must be reversed because the court failed to demand even that much of the Texas statute. For the Fifth Circuit treated the district court's "finding . . . to the effect that no rational basis exists for prohibiting this manner of sexual conduct" as simply immaterial to the constitutional issue (136a), and made it clear, upon denying the renewed petition for rehearing *en banc* on October 23, 1985, that it

[50] In *Loving*, the Court rejected the reasoning of *Pace* v. *Alabama*, 106 U.S. 583 (1883), which had upheld a conviction under a state law that punished interracial adultery and fornication more severely than such conduct by members of the same race. 388 U.S. at 10.

[51] The proposition that heightened scrutiny, or at least rationality review of a meaningful sort, should be triggered by this statute's gender classification must be distinguished from any argument that discrimination against homosexuals as a group is constitutionally suspect. *See, e.g.*, Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv.L.Rev. 1285 (1985).

had made no effort actually to assess the "rationality" of *any* of the many legislative judgments underlying the statute at issue. When pressed by petitioner to at least *address* the district court's conclusion that "the record in this particular case does not support a finding of moral justification for the statute or a finding that in its enactment the Texas legislature was motivated by considerations of morality" (135a), the court below insisted that "it is simply not the business of this court" to worry about such matters (135a-136a).[52]

For the Fifth Circuit, a passing reference to an historical "objection to homosexual conduct" sufficed to link the challenged statute to "implementing morality, a permissible state goal." (5a). If the mere invocation by a law's defenders of the truism that a legislative majority once deemed objectionable the very acts that the legislature declared criminal could suffice to terminate judicial review on the ground that "[m]oral issues should be resolved by the people" (137a), then, for all practical purposes, the rationality of laws regulating private consensual conduct will have been rendered a non-justiciable "political" question.[53]

Under such an utterly toothless standard, a court would be free to uphold a statute such as § 21.06 even if it found that the law in no way advanced any "legitimate public purpose that transcends the harm to the members of [a] disadvantaged class," *City of Cleburne* v. *Cleburne Living Center*, 105 S.Ct. 3249, 3261 (1985) (Stevens, J., joined by Burger, C.J., concurring) (footnote omitted), but rather reflected merely "a bare [legislative] desire to harm a politically unpopular group,"

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[52] Even if no determination of the actual purpose of § 21.06 were needed, the court of appeals shirked its duty, in the face of a district court finding of no rational purpose whatsoever, at least to *describe* "a legitimate purpose that we may reasonably presume to have motivated an impartial legislature." *Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring in the judgment).

[53] In abjuring meaningful judicial scrutiny on the express grounds that the issue in this case is politically controversial and that affirming the district court judgment might provoke some citizens to take the law into their own hands to visit retribution on petitioner and other homosexuals, the Fifth Circuit seems to have confused "political cases" with "political questions." *See Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

*United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973). Indeed, the *en banc* majority was unimpressed by just such a finding by the district court below: namely, that when the Texas penal code was amended to legalize adultery, fornication, and heterosexual sodomy, the legislature deliberately singled out "'the private homosexual acts of consenting adults'" for continued criminal condemnation out of "'fear[ of] a backlash against the entire Penal Code [revision] should such acts be decriminalized.'"[54] Nor did the court below find it significant that defendant Wade, a Texas prosecutor for thirty years, "testified that he knew of no rational basis for the discrimination in § 21.06 between homosexual sodomy and heterosexual sodomy" (62a-63a) and that, as the district court stressed, the defendants ultimately retreated to the position that the statute was justified by a "'phobic response'" to homosexuality, which has "'been abhorred in western civilization.'" (65a).

Not only did the court below abandon any standard of review trenchant enough to flush out unconstitutional legislative animus. Worse than that, it declared that popular antipathy itself tied the court's hands: were it to rule for petitioner Baker, the court below warned, the "feelings of [those who disapprove of homosexuality] . . . could be elevated . . . and their frustrations might be vented upon [homosexuals] to a degree that increased the burdens of the latter beyond the consequences endured under the invalidated statute." (137a). But the Constitution "does not permit any official act . . . to be predicated on so weak a reed. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of . . . prejudice that they assume to be both widely and deeply held. Surely the promise of the Fourteenth Amendment demands more than nihilistic surrender." *Palmer* v. *Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting); *see also Palmore* v. *Sidoti*, 104 S.Ct. 1879, 1882 (1984).

[54] (79a) (quoting Von Beigel, *The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal Code Revision Committee*, 6 *Human Rights* 23 (1977)). (*See also* 42a n.30, 103a).

## CONCLUSION

For all of these reasons, a writ of certiorari should be granted now and this case should be set for argument. Alternatively, this petition should be held pending the outcome in *Bowers* v. *Hardwick*, No. 85-140, and, if the Eleventh Circuit is affirmed in that decision, should be granted and the decision below vacated and remanded in light of that affirmance.

Respectfully submitted,

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